



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE HOUSE STATION 17 AUGUSTA, MAINE 04333

BOARD ORDER

BORALEX ASHLAND LP) APPEAL OF SOLID
ASHLAND, AROOSTOOK COUNTY, MAINE) WASTE LICENSE
WOOD ASH UTILIZATION PROGRAM LICENSE) FINDINGS OF FACT
#S-021177-SE-G-M) AND ORDER
) (GRANTED)

Pursuant to the provisions of the *Maine Hazardous Waste, Septage and Solid Waste Management Act* 38 MRSA §§ 1301 to 1319-Y, the *Solid Waste Management Rules: General Provisions*, 06-096 CMR 400 (last amended February 18, 2009), the *Solid Waste Management Rules: Water Quality Monitoring, Leachate Monitoring and Waste Characterization*, 06-096 CMR 405 (last amended June 16, 2006), the *Solid Waste Management Rules: Beneficial Use of Solid Wastes*, 06-096 CMR 418 (last amended June 16, 2006), the *Solid Waste Management Rules: Agronomic Utilization of Residuals* (last amended December 19, 1999), and the *Rules Concerning the Processing of Applications*, 06-096 CMR 2 (effective April 1, 2003), the Board of Environmental Protection (Board) has considered the appeal filed by Boralex Ashland LP (Boralex Ashland, licensee or appellant), of the Department's approval of the above noted license application. Based upon materials in the Department's file and materials submitted by the licensee, the Board finds the following facts:

1. LICENSING HISTORY

- A. On November 4, 1993, the Department issued Order #S-021177-SE-A-N which approved a woodash utilization program for Northeast Empire Limited Partnership #2 (NELP#2).
- B. On May 9, 2002, the Department issued Order #S-021177-SX-D-T which approved the transfer of NELP#2's Department-issued licenses to Boralex Ashland, Inc. (BAI).
- C. On June 21, 2002, the Department issued Order #S-021177-SE-B-R which renewed BAI's woodash utilization program license, and approved the transition of their program into the new requirements of 06-096 CMR 419, which replaced *Rules for Land Application of Sludge and Residuals*, 06-096 CMR 567 (last amended January 4, 1994, repealed and replaced July 19, 1999).
- D. On January 8, 2007, the Department issued Order #S-021177-SX-H-T which approved the transfer of BAI's Department-issued licenses to Boralex Ashland LP (Boralex Ashland).

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- E. On June 24, 2009, the Department issued Order #S-021177-SE-G-M which approved, with conditions, the request by Boralex Ashland to modify its wood ash utilization program license. The Department issued Order #S-021177-SE-G-M subject to the following relevant conditions (Special Conditions #3 and #4):
- (1) Prior to using any site for the land application of wood ash exceeding the (2,250 mg/kg) screening standard in 06-096 CMR 418, Appendix A for manganese (Mn) the applicant shall representatively sample and analyze the soil once for (background) Mn; and
 - (2) At any site used for the land application of wood ash exceeding the (2,250 mg/kg) screening standard in 06-096 CMR 418, Appendix A for Mn:
 - (a) The SI¹ shall be estimated in accordance with the calculations in 06-096 CMR 419, Appendix A(2)(C) and use of the site shall be limited such that the combined total of the SI plus the soil background concentration does not exceed the (2,250 mg/kg) screening standard in 06-096 CMR 418, Appendix A for Mn; and
 - (b) The useful life of the site shall be limited such that should the level of Mn increase, site life is adjusted downward to ensure that the SI plus the soil background concentration does not exceed the (2,250 mg/kg) screening standard in 06-096 CMR 418, Appendix A for Mn.
- F. On July 29, 2009, Boralex Ashland LP submitted a timely appeal of the Commissioner's license approval. The applicant appealed Special Conditions #3 and #4 of Department Order #S-021177-SE-G-M. The appeal included several exhibits that were not part of the Department's file when the Department issued its decision on the application on June 24, 2009.
- G. On September 9, 2009, Board Chair Susan Lessard ruled that the supplemental evidence submitted by the appellant is relevant and material and, therefore, admitted into the administrative record.

¹ SI - Cumulative soil concentration increase in mg-pollutant/kg-soil

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2. BASIS FOR APPEAL OF THE DEPARTMENT LICENSE:

A. Inconsistency with the "No Site License" Program for Ash:

The appellant asserts that the imposition of Special Conditions #3 and #4 is a change that is inconsistent with the "no site license" program established in 06-096 CMR 419.

The appellant further asserts that since the Department issued an amendment to its original license to bring its ash program into compliance with 06-096 CMR 419, it should not be required to test utilization site soils for Mn. The appellant goes on to explain that in the original program license, there is no finding regarding elevated levels of Mn in the ash. The applicant presumes the reason for this is because the Department did not have a standard applicable to Mn in ash that was destined for agronomic use.

B. Use of 06-096 CMR 418 Appendix A Standards for Agronomic Utilization Sites:

- (1) The appellant argues that the solid waste rules are clear that the screening standards in 06-096 418 Appendix A are to be used to screen for hazardous substances other than metals. The appellant further asserts that 06-096 419(1)(D) states that agronomic utilization is a type of beneficial use and that generators proposing to beneficially use solid waste or waste derived products in a manner that does not constitute agronomic utilization must meet the applicable standards of 06-096 CMR 418. Therefore, the appellant concludes that this suggests that the standards in 06-096 CMR 418 are intended to apply to beneficial uses other than agronomic utilization and precludes using 06-096 CMR 418 Appendix A to regulate the agronomic utilization of wood ash.
- (2) The appellant argues that applying the standards in 06-096 CMR 418, Appendix A is not appropriate since the Department has not conducted a risk assessment or adjusted the screening standard in 06-096 CMR 418, Appendix A to account for the calcium carbonate equivalence of the ash, exposure pathways of concern, or for the availability of manganese in ash amended soils. The appellant further argues that the Mn screening standard in 06-096 CMR 418, Appendix A is not appropriate because the standard applied to the appellant's woodash represents the USEPA screening standard for

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residential ingestion. The appellant questioned whether a residential ingestion standard is appropriate for agronomic use.

C. Years Required to Approach Soil Screening Levels:

The appellant contends that modeling of likely application rates indicates that the average site could be used for decades without soil concentrations reaching soil screening levels, and that decades of repeated applications are precluded by the pH of ash amended soil.

D. Background Soil Data:

The appellant asserts that the elevated soil levels of Mn that the Department describes in its findings (Finding 6(A) of Department Order #S-021177-SE-G-M) are suspect and the average soil analysis of Maine soils are less than half the screening limit. The appellant states that they re-sampled several of the farms initially sampled by LP Corp. and found no soils in excess of the (2,250 mg/kg) screening standard in 06-096 CMR 418, Appendix A for Mn.

E. Increased Cost to Ash Generators:

The appellant contends that the cost to ash generators of this change in interpretation is substantial. The cost of total Mn analysis, using pricing from the University of Maine Soil Testing Service is \$25.00 per sample, not including postage. The data shown in Table 1 (of its appeal) required 50 hours of staff time at a cost of approximately \$3,750.00 or roughly \$60.00 per sample for labor. The combined cost (analytical plus labor) is approximately \$85.00 per sample. Based on an annual generation of 11,000 tons per year, an average application rate of three tons per acre and a maximum allowable acreage of eight acres per soil sample, Boralex Ashland will need approximately 458 samples in 2009 at a cost of \$38,930 to conduct initial sampling on its sites.

F. Consistency in Applying Requirements for Mn Analysis:

The appellant argues that the Department's new interpretation of 06-096 CMR 419 has not been applied consistently, as would have been the case with a rule change. The appellant also states that over 12 ash generators are operating under agronomic utilization program licenses but only three generators (to Boralex's knowledge) are currently required to do soil testing for total Mn. The appellant further asserts that this creates increased costs for ash generators subject to these conditions putting them at a competitive disadvantage in the marketplace.

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G. Impact on Ash Recycling Rates:

The appellant states that if all ash generators are required to test site soils for background levels of Mn this could have the unintended consequence of making landfilling the ash a more viable alternative to agronomic utilization which would be in clear conflict with Maine's solid waste hierarchy.

3. RESPONSE TO THE APPEAL

After considering the appellant's arguments regarding the applicability of 06-096 CMR 418 Appendix A and the Department's response and after reviewing the relevant provisions of Department rules 06-096 CMR 418 and 419, the Board finds that the screening standard in 06-096 CMR 418 Appendix A for manganese does not directly apply to agronomic utilization.

The Board also finds that while it may be appropriate to require limits on Mn and testing of site soils prior to residual application and monitoring of soils, etc., the sampling and testing requirements and appropriate concentration should be established in rule. Therefore, the Board finds that Special Conditions #2, #3 and #4, Finding 6.A – Risk Management – Manganese, and Conclusions 1.A, B and C should be removed and Finding 3 – Residual Suitability, Finding 4 – Sampling and Analytical Work Plan, the remainder of Finding 6 - Risk Management, Finding 14.B – Record Keeping and Reporting – Reporting, and Special Condition 12 should be revised to address the matter of Mn in the appellant's utilization program license (Department Order #S-021177-SE-G-M).

The Board makes no findings regarding the other issues raised or asserted by the appellant and, therefore, all other Findings of Fact remain as set forth in Department Order #S-021177-SE-G-M.

BASED on the above Findings of Fact, the Board makes the following CONCLUSIONS:

1. The appellant has standing, is aggrieved and has made a timely appeal of the Department Order.
2. The appellant has submitted information or arguments which would warrant removing Special Conditions #2, #3 and #4, Finding 6.A – Risk Management – Manganese, and Conclusions 1.A, B and C, and revising Finding 3 – Residual Suitability, Finding 4 – Sampling and Analytical Work Plan, the remainder of Finding 6 - Risk Management, Finding 14.B – Record Keeping and Reporting – Reporting, and Special Condition 12 regarding Mn in the appellant's utilization program license (Department Order #S-021177-SE-G-M).

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3. All other conclusions remain as set forth in Department Order #S-021177-SE-G-M.

THEREFORE, the Board GRANTS the appeal by Boralex Ashland LP and modifies Department Order #S-021177-SE-G-M to remove Special Conditions #2, #3 and #4, Finding 6.A – Risk Management – Manganese, and Conclusions 1.A, B and C, and to revise Finding 3 – Residual Suitability, Finding 4 – Sampling and Analytical Work Plan, the remainder of Finding 6 - Risk Management, Finding 14.B – Record Keeping and Reporting – Reporting, and Special Condition 12 regarding manganese.

DONE AND DATED AT AUGUSTA, MAINE, THIS 17th DAY OF DECEMBER, 2009.

BOARD OF ENVIRONMENTAL PROTECTION

BY: _____
Susan M. Lessard, Chair

PLEASE NOTE ATTACHED SHEET FOR GUIDANCE APPEAL PROCEDURES.

Date of initial receipt of application: September 9, 2006

Date of application acceptance: October 2, 2006

Date filed with Board of Environmental Protection: June 29, 2009

Date of initial receipt of appeal: July 29, 2009

Date of appeal with Board of Environmental Protection: November 19, 2009

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